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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 713

W. C. NABORS, D/B/A W. C. NABORS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-13a) is reported at 323 F. 2d 686. The Board's supplemental decision and order (P.A. 216-275, 305-309)[1] are reported at 134 NLRB 1078.

JURISDICTION

The supplemental decree of the court of appeals (Pet. 15a-16a) was entered on November 19, 1963.

[1] References to the Appendix to petitioner's brief in the court below will be designated "P.A."; references to the Appendix to the Board's brief will be designated "R.A." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

The petition for a writ of certiorari was filed on December 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the doctrine of laches or a state statute of limitations applies to a Board proceeding to determine the amount of back pay due employees who, in violation of Sections 8(a) (3) and (1) of the National Labor Relations Act, were discharged for union activities.

2. Whether, in computing the gross back pay due employees discharged in violation of the Act, the Board properly included the profit shares regularly paid by the employer to its employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth in the petition (Pet. 3–6). The relevant provisions of the Board's rules and regulations are set forth in the Appendix (*infra*, pp. 10–12).

STATEMENT

A. The Board Proceeding

1. Background

In *W. C. Nabors Co.*, 89 NLRB 538, decided April 19, 1950, the Board held that petitioner Nabors violated Sections 8(a) (3) and (1) of the Act by selecting the employees for an economic layoff on the basis of union activity. The Board ordered Nabors to offer reemployment to 17 of the 19 discriminatees, the other two having disclaimed any interest in rein-

statement, and to make all 19 whole for any losses suffered. Nabors refused to comply with the order, and the Board petitioned the court below for enforcement. On April 29, 1952, the court enforced the Board's order in full. *National Labor Relations Board* v. *Nabors,* 196 F. 2d 272 (C.A. 5). Nabors then petitioned for certiorari, which was denied on October 27, 1952. 344 U.S. 865.

In February 1955, after attempts to secure compliance with the court's order proved unsuccessful, the Board initiated civil contempt proceedings in the court below against petitioner. On May 31, 1955, that court entered an order which, *inter alia,* approved a stipulation providing for the reinstatement of certain employees. The order also provided that "the questions relating to making whole the employees named in the Decree for losses sustained by them were subject to final determination by interlocutory hearings before the National Labor Relations Board and Proceedings before this Court." (Pet. 1a–2a; R.A. 660–661).

Pursuant to the Board's rules an investigation was made of petitioner's records for the purpose of drawing up a backpay specification.[2] This specification,

[2] The specification shows in detail, for each employee, "the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back-pay and interim earnings, the expenses for each quarter, the net back-pay due, and any other pertinent information" (29 CFR 102.53, Appendix, *infra,* p. 10). It is served upon the respondent, who is required to file an answer, and, after issue is thus joined, the matter proceeds to formal hearing before a trial examiner of the Board (29 CFR 102.54, 102.59, Appendix, *infra,* pp. 10–12).

some 140 pages in length, was served on petitioner on March 25, 1959 (P.A. 218–219; 2018).[3] Petitioner filed a detailed answer (P.A. 19–80), and the matter then went to hearing before the Trial Examiner, who issued his report on September 9, 1960 (P.A. 216–275). Petitioner filed exceptions to the report, and, on December 7, 1961, the Board issued its supplemental decision and order affirming the Trial Examiner (P.A. 305–309).[4]

2. The Board's Decision

The Board found that 11 of the 19 discriminatees were entitled to backpay, in amounts ranging from $544.86 to $16,872.57, and ordered petitioner to pay those sums (P.A. 308, R.A. 720). The Board computed the gross backpay due each discriminatee[5] on the basis of the weekly wages paid to employees who worked for petitioner in the same or equivalent job classifications throughout the relevant backpay period. To these amounts the Board added the profit shares which were paid to the incumbent employees in June and December of each year, except that for 1949, when those employees did not receive a profit share in June, only the December payment was included (P.A. 227–228, 233, 3–4; R.A. 558–559, 564, 571–572; Backpay Spec. App. A–1, B–1, C–1). These profit shares

[3] The appendices to the specification were not reprinted but were lodged with the court below in manuscript form.

[4] The Board issued a correction to the order on March 29, 1962 (R.A. 720–721).

[5] Gross backpay is the sum the employee would have earned had he remained in petitioner's employ, before deduction of any earnings which he may have obtained from other employment.

represented a percentage of the profits, determined unilaterally by petitioner (P.A. 232, 233; R.A. 560–563). They were given to all production employees on the payroll at the time payment was made, on the basis of the time each employee had worked during the bonus period (P.A. 232; R.A. 560).

The Board rejected petitioner's contention that, since the profit shares were paid on a purely voluntary and discretionary basis, they could not properly be included in the computation of backpay. The Board concluded that petitioner had recognized that the profit shares were in reality wages;[6] and that, in any event, the term "wages," as used in the Act, includes all emoluments of value, including gratuities, arising out of the employment relation (P.A. 232–237).

Petitioner also contended that, because of the long delay between the end of the contempt proceeding and the issuance of the backpay specification, the proceeding was barred by the doctrine of laches and by the statute of limitations of the State of Louisiana. The Board rejected this contention on the ground that neither the doctrine of laches nor State statutes of limitations apply to an agency of the United States Government in proceedings involving the exercise of

[6] Petitioner often told his employees that they received the profit shares because they "earned" them, and that "they would earn more money and I could pay more money by cooperating on that basis" (P.A. 234; R.A. 563). Moreover, taxes and social security payments were withheld from the profit shares on the same basis as they were from the regular pay of the employees (P.A. 234; 169–171, R.A. 565, 599). And, each employee received only one W-2 form at the end of the year which lumped in one total the remuneration he received both weekly and through his profit share payments (P.A. 565, 596–597).

its public or governmental functions (P.A. 307, n. 3; see also, P.A. 225).

B. The Court of Appeals' Decision

With slight modifications, the court of appeals enforced the Board's backpay order in full (Pet. 1a–13a).

ARGUMENT

The decision of the court of appeals is correct, and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. Petitioner's contention (Pet. 11–18) that the back pay claims were barred by the doctrine of laches or by Louisiana's one-year statute of limitations is contrary to the settled principle, applied by the Board and the court below, that the United States, or any agency thereof, is not bound by such restrictions in enforcing a public right. See *United States* v. *Summerlin*, 310 U.S. 414, 416, and cases there cited.[7] Nor is petitioner aided by the holding in *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27, that a backpay claim, enforceable by the Board, is not "a debt due to the United States within the meaning of R.S. § 3466, and therefore entitled to priority under § 64(a)(5) of the Bankruptcy Act." The basis for this holding was not, as petitioner suggests (Pet.

[7] To subject Board proceedings to the restrictions imposed by state statutes of limitations would also run counter to Congress' desire to obtain a uniform administration of the law governing labor-management relations in industries affecting commerce. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 490; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 122–124; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365.

13–14), that the Board, in enforcing a back pay claim, is merely enforcing a private right. On the contrary, the Court specifically recognized that a "back pay order is a reparation order designed to vindicate the public policy of the statute" (344 U.S. at 27),[8] but concluded that, notwithstanding its public character, it did not qualify for the governmental priority under the Bankruptcy Act, which was designed only "'to secure an adequate revenue to sustain the public burthens and discharge the public debts'" (*id.*, at 27–28).[9]

The situation here is entirely distinguishable from that in *United States* v. *Beebe*, 127 U.S. 338 (Pet. 12). The suit there, although brought by the government, was purely for the vindication of private rights. As the Court noted, "the Government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. * * * [T]he right asserted is a private right, which might have been asserted without the intervention of the United States at all." 127 U.S. at 346. Here, on the other hand, the Board is the only party which can institute a backpay proceeding, and, as shown, its purpose is to vindicate the public interest

[8] See also *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197.

[9] The limited nature of the holding in *Nathanson* is confirmed by Mr. Justice Frankfurter's concurring opinion in *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 412, n. 3. The Court in *Deena* reversed the judgment of the Sixth Circuit, relied on by petitioner (Pet. 13).

and not merely the private rights of the employees involved.

2. There is no substance to petitioner's contention (Pet. 19–20) that the Board exceeded its authority by including the profit shares in the computation of gross back pay. The purpose of a back pay award is to "make whole" the employee for losses which he suffered as a result of the unlawful discrimination. See *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. Though petitioner was not obligated to make profit share payments to the employees, during the backpay period it did in fact elect to do so twice a year (except in 1949); thus, had the discriminatees been employed then (as they would have been but for petitioner's unlawful action), they would have received profit shares in addition to their regular wages. In these circumstances, as the court below found (Pet. 6a), the Board properly included the profit shares which the discriminatees would have received[10] in its computation of gross back pay. See *National Labor Relations Board* v. *Moss Planing Mill Co.*, 224 F. 2d 653, 654 (C.A. 4).

[10] As noted (p. 4), only one share was included for 1949, since petitioner made only one payment in that year.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1964.

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[11] Arnold Ordman, General Counsel of the National Labor Relations Board, has disqualified himself because he was the Trial Examiner who conducted the hearing in this case.

APPENDIX

The relevant portions of the National Labor Relations Board Rules and Regulations, Series 8 as amended, 29 CFR 102.52, *et seq.*, are as follows:

SEC. 102.52 *Initiation of proceedings.*— After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director shall issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification. * * *

SEC. 102.53 *Contents of back-pay specification and of notice of hearing without specification.*—(a) *Contents of back-pay specification.* Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.

* * * * *

SEC. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without back-pay specification.*

(a) *Filing and service of answer to specifications.*—The respondent shall, within 15 days

from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and en-

ter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

* * * * * *

SEC. 102.55 *Extension of time for filing answer to specification.*—Upon his own motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer shall be filed.

SEC. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

* * * * * *

SEC. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without back-pay specification, the procedures provided in sections 102.24 to 102.51, shall be followed insofar as applicable.

U. S. GOVERNMENT PRINTING OFFICE: 1964